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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	EB Docket No. 03-96
	)	
NOS COMMUNICATIONS, INC.,	)	File No. EB-02-TC-119
AFFINITY NETWORK INCORPORATED and	)	
NOSVA LIMITED PARTNERSHIP	)	NAL/Acct. No. 20033217003
	)	
Order to Show Cause and Notice	)	FRN: 0004942538
of Opportunity for Hearing	)	

OPPOSITION TO MOTION TO STRIKE AND
REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

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SUMMARY

The petition for reconsideration was filed by NOS Communications, Inc., Affinity Network Incorporated, and NOSVA Limited Partnership (collectively the "Companies") in accordance with § 1.106(a)(1) of the Commission's Rules ("Rules"), which permits a petition for reconsideration of a hearing designation order that challenges an adverse ruling as to the petitioner's participation in the hearing. The Companies sought reconsideration on behalf of their principals who were made the respondents to the Commission's show cause order, but who are not subject to the Commission's jurisdiction and do not wish to participate in this proceeding. Consequently, the issuance of a show cause order compelling their participation was an adverse ruling for the purposes of § 1.106(a)(1) of the Rules.

In *Westel Samoa, Inc.*, 13 FCC Rcd 6342 (1998), the Commission entertained and granted a petition for reconsideration of a hearing designation order that challenged its jurisdiction to issue a show cause order against an individual under § 312 of the Communications Act ("Act"). Having entertained a petition for reconsideration of the *Westel* designation order that raised the same jurisdictional objections the Companies assert here, the Commission must entertain the Companies' petition under the maxim that it must treat "similar cases similarly."

The Enforcement Bureau ("Bureau") relies exclusively on § 4(i) of the Act as the Commission's authority to revoke the Companies' blanket authority under § 214 of the Act. However, the Commission's general authority under § 4(i) to take actions "not inconsistent" with the Act obviously does not constitute the *express* grant of authority necessary to sanction the Companies under § 558(b) of the Administrative Procedure Act ("APA").

Congress expressly authorized the Commission to revoke a station license when it enacted § 312(a) of the Act in 1934. In contract, Congress never authorized the Commission to revoke a §

214 certificate. When Congress has not explicitly authorized the revocation of § 214 certification, the Commission cannot infer that power from its general authority under § 4(i).

Telemarketing is a form of commercial speech protected by the First Amendment. The enforcement of the "unjust and unreasonable" standard of § 201(b) to sanction commercial speech raises serious issues under the First and Fifth Amendments. Because it touches so close to First and Fifth Amendment rights, the power to sanction commercial speech cannot be read into § 201(b).

The Bureau reads issue (c) to contemplate an order that the Companies and/or their principals "cease and desist violating the law." As written, issue (c) contemplates an order that the Companies and/or their principals cease and desist "from the provision of any interstate common carrier services without the prior consent of the Commission." The provision of such service without prior Commission consent is lawful. In *Westel*, the Commission held that § 312(b) does not authorize the issuance of an order to cease and desist lawful conduct.

The Bureau now maintains that the Commission's authority to order the Companies and/or their principals to cease and desist derives from § 312(c), which contemplates a hearing proceeding against a "person" before the issuance of a cease and desist order. Nothing in the legislative history of § 312, nor in its language, suggests that a Title II carrier holding no Title III license can be the subject of a § 312(b) cease and desist order.

The "administrative sanctions" provisions of § 312 are among what Congress designated as "Special Provisions Relating to Radio." Congress specified in § 312(e) that the provisions of APA § 558(c) apply to any proceeding for the issuance of a cease and desist order. APA § 558(c) in turn applies only to the withdrawal, suspension, revocation, or annulment of a license. Because Congress specified that procedures applicable only to licensees under the APA be employed prior to the

issuance of a show cause order under § 312(c), the term "person" in §§ 312(b) and 312(c) means an individual, partnership, association, joint-stock company, trust, or corporation that holds a radio station license.

APA § 558(c) embodies the "second chance" doctrine under which a proceeding cannot be instituted until the licensee had been given (1) notice in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements. No principal of the Companies received written notice of the conduct which may subject him or her to an order to cease and desist. Nor was a principal afforded an opportunity to achieve compliance with § 201(b) prior to the release of the *Order*. For those reasons, no cease and desist order issued against a principal in this case would be valid under §§ 312(e) of the Act and 558(c) of the APA.

The Bureau argues that a forfeiture can be imposed in this case, because conduct in violation § 201(b) of the Act is not listed in § 1.80(a) of the Rules as statutorily exempt from forfeiture under § 503(b)(1) of the Act. However, the imposition of a forfeiture is obviously a sanction. A rule reflecting the Commission's interpretation of the § 503(b)(1) exemption is not a substitute for the express statutory authorization necessary to impose a forfeiture for a § 201(b) violation.

A carrier can be sanctioned for engaging in telemarketing practices in violation of § 201(b) only if it fails to obey a Commission order prescribing just and reasonable telemarketing practices that was issued in accordance with § 205(a) of the Act. The imposition of a forfeiture is expressly authorized by § 205(b) if a carrier engages in telemarketing practices in violation of a prescription order. The Commission cannot circumvent the process authorized by § 205 by imposing a forfeiture under § 503.

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OPPOSITION TO MOTION TO STRIKE AND
REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

NOS Communications, Inc., Affinity Network Incorporated, and NOSVA Limited Partnership (collectively the "Companies"), pursuant to § 1.106(g),(h) of the Commission's Rules ("Rules"), and on behalf of their respective principals, hereby responds to consolidated motion to strike and opposition ("M&O") filed by the Enforcement Bureau ("Bureau") with respect to the Companies' petition for reconsideration ("Pet.") of the Commission's *Order to Show Cause and Notice of Opportunity for Hearing* ("*Order*") in this proceeding.

OPPOSITION TO MOTION TO STRIKE

I. The Petition Was Filed In Accordance With § 1.106(a)(1) Of The Rules

We believe it to be axiomatic that the parties to a show cause hearing are the parties ordered to appear at the hearing to show cause. The Companies plainly were not ordered to appear at the hearing in this case to show cause. *See Order*, at 13-14 (¶¶ 25, 26, 29).

The Bureau claims that a "fair reading" of the *Order* confirms that the Commission "did, in fact, make the Companies parties to the instant proceeding." M&O at 3. Under § 1.701 of the Rules, there should be no need to construe a show cause order to determine the party that it is to appear

before the Commission to show cause. The rule provides: "The Commission may commence any proceeding within its jurisdiction against any *common carrier* by serving upon the *carrier* an order to show cause. The order . . . will call upon the *carrier* to appear before the Commission at a place and time therein stated and give evidence upon the matters specified in the order." 47 C.F.R. § 1.701(a) (emphasis added).

The *Order* did not call upon any carrier to appear before Commission to show cause. The Commission ordered the "principal or principals" of three carriers to appear and show cause. *See Order* at 14-15 (¶¶ 25, 26, 29). That ruling was adverse to the interests both of the Companies and their unnamed principals.

Contrary to the Bureau's unwarranted claim that they were attempting "to evade responsibility for their apparent misconduct," M&O at 4-5, the Companies wanted the opportunity to appear to show that they are not responsible for any misconduct. That was not the case with respect to whomever the Commission considers to be the principals of the Companies. They are not carriers subject to the Commission's jurisdiction and do not wish to participate in this proceeding. Consequently, the issuance of a show cause order compelling their participation was an adverse ruling for the purposes of § 1.106(a)(1) of the Rules.

II. The Petition Must Be Entertained Under *Westel*

In the enforcement of its procedural rules, the Commission must treat "similar cases similarly." *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985). Thus, the Commission must treat the Companies' petition for reconsideration of the *Order* like it treated the petition for reconsideration of the hearing designation order, order to show cause, and notice of opportunity for hearing issued in *Westel Samoa, Inc.*, 12 FCC Rcd 14057 (1997). In *Westel,* the

Commission entertained -- and granted -- a petition for reconsideration that challenged its jurisdiction to issue a show cause order against an individual under § 312 of the Communications Act ("Act"). *See Westel Samoa, Inc.*, 13 FCC Rcd 6342, 6347-48 (1998).

The Bureau appears to acknowledge that *Westel* created a "narrow exception" to the "strict limitation" of § 1.106(a)(1). *See* M&O at 5 n.15. It characterizes *Westel* as an "anomalous case." *Id.* That characterization hardly distinguishes the case as precedent. The very same jurisdictional anomaly that was presented in *Westel* is presented here.

The individual respondent in *Westel* was ordered to show cause why he should not be barred from "holding Commission authorizations and participating in future Commission auctions," because he allegedly engaged in misconduct before the Commission which called into question his qualifications to be a Title III licensee. *See* 12 FCC Rcd at 14075-76. Like the Companies here, the respondent sought reconsideration of the hearing designation order, arguing that the Commission was without authority to order him to show cause.[1/] Also like the Companies, the respondent in *Westel* asserted that § 312(b) of the Act did not authorize the Commission to order him to cease and desist lawful conduct.[2/]

By entertaining a petition for reconsideration of the *Westel* hearing designation order that raised the same jurisdictional objections the Companies assert here, the Commission created an exception to § 1.106(a)(1) that plainly applies to the Companies' jurisdictional challenge to the *Order*. To paraphrase *Green Country*, "If the Commission so chooses, it may prospectively overrule

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[1/] *See* Petition for Reconsideration, WT Docket No. 97-199, at 13-17 (Oct. 6, 1997).

[2/] *Compare id.* at 16-17 *with* Pet. at 8.

[*Westel*]. So long as [*Westel*] remains law, however, it may not be arbitrarily ignored or limited. If there are to be exceptions, they must be administered in a rational manner." 765 F.2d at 239.

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

I. The Bureau's Opposition Was Late-Filed

Relying on §§ 1.4(h) and 1.106(g) of the Rules, the Bureau claims that its opposition was timely filed. *See* M&O, at 1 n.2. Section 1.4(h) would have applied if the Companies' petition for reconsideration was "in fact served by mail" on the Bureau. 47 C.F.R. § 1.4(h). It was in fact served on the Bureau by hand on May 7, 2003. Therefore, under §§ 1.4(j) and 1.106(g) of the Rules, the Bureau's opposition was due on May 19, 2003. It was filed late on May 20, 2003.[3/]

II. The Commission Is Not Authorized To Revoke § 214 Certification

The Bureau wrongly claims that we did not cite "to any statute, precedent or rule that in any way refutes the Commission's authority" to revoke the Companies' § 214 authority. M&O, at 6. We cited § 558(b) of the Administrative Procedure Act ("APA"), §§ 4(i) and 214 of the Act, a Supreme Court case, four courts of appeals decisions, and three Commission cases. *See* Pet., at 4-8.[4/]

Abandoning the Commission's claim that § 214 authorizes the revocation of the Companies' "operating authority," *Order*, at 13 (¶ 25), the Bureau relies on § 4(i) for the Commission's authority "to take action against licensees that have engaged in egregious misconduct in violation of the Act and the rules, and have abused their public trust." M&O, at 6. Of course, the Companies are not

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[3/] The untimeliness of the Bureau's opposition betrays its argument that the Companies' petition should be stricken on procedural grounds. A procedural argument premised on the need for the "orderly conduct" of the proceeding and the prevention of "disruption and delay" should lose much of its force when presented past its deadline. *See* M&O, at 2-3.

[4/] We did not cite to a rule since rules are not a source of the Commission's jurisdiction.

licensees; they are not accused of violating a rule; and, as non-licensee common carriers, they are not considered to hold a "public trust."[5/] Regardless, the Commission's general authority under § 4(i) to take actions "not inconsistent" with the Act obviously does not constitute the *express* grant of authority necessary under APA § 558(b) to sanction the Companies. 47 U.S.C. § 154(i).

The Commission itself has recognized that § 4(i) simply does not provide any "express statutory authority." *See Hill & Welsh*, 16 FCC Rcd 9485, 9490 (WTB 2001), *aff'd*, FCC 03-70, 2003 WL 1726515 (Apr. 1, 2003). Because it does not contain a "specific congressional mandate," § 4(i) should not be construed to authorize novel regulatory actions or be interpreted in a way that ignores deliberate and careful limitations on the Commission's power. *See Radio Station WSNT, Inc.*, 45 FCC 2d 377, 381-82 (1974), *aff'd, Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975).

Revocation was well known to Congress when it passed the Act in 1934. By the enactment of § 312(a), Congress expressly authorized the Commission to revoke a station license for specified reasons following a specified procedure.[6/] At the same time, Congress did not authorize the Commission to revoke a certificate of public convenience and necessity issued to a common carrier under § 214.[7/] Over the next nearly 70 years, Congress has augmented the Commission's enforcement authority under Title III,[8/] but it has never authorized the revocation of any authorization

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[5/] Broadcast licensees, not common carriers, are thought to be holders of a "public trust." *E.g.*, *TeleSTAR, Inc.*, 2 FCC Rcd 5, 17 (Rev. Bd. 1987).

[6/] Congress provided for the revocation of licenses under § 312 when the Act was passed in 1934. *See* Max D. Paglin, *A Legislative History of the Communication Act of 1934* 945-46 (1989).

[7/] *See id.* at 933-34.

[8/] *See* Max D. Paglin, *The Communications Act: A Legislative History of the Major Amendments 1934-1996* 14 (1999).

issued under § 214. When Congress has not explicitly authorized the revocation of § 214 certification, the Commission cannot infer that power from its general authority under § 4(i). And it certainly cannot wait 63 years to be heard to claim that § 4(i) empowers it to revoke a Title II carrier's operating authority under § 214.[9/]

By arguing that the Commission would be "powerless" and "hamstrung" without the authority to withdraw blanket § 214 authorization, *see* M&O, at 6, the Bureau is claiming in effect that it has inherent sanctioning power despite APA § 558(b), a notion that was soundly rejected in *American Bus Ass'n v. Slater*, 231 F.3d 1, 7(D.C. Cir. 2000). Moreover, the claim is specious. Assuming its has jurisdiction over the telemarketing practices of carriers - - a matter in considerable doubt - - the Commission certainly could exercise is rulemaking authority under §§ 4(i) and 201(b) to prohibit specific telemarketing practices by carriers, or its authority under § 205(a) to prescribe such practices. It would then have the power to enforce its telemarketing rules or its prescription order in the manner authorized by the Act. *See* 47 U.S.C. §§ 205(b), 401(b), 502.

APA § 558(b) also prohibits the imposition of a sanction "except within jurisdiction delegated to the agency." 5 U.S.C. § 558(b). Contrary to the Bureau's suggestion, *see* M&O, at 5 n.15, the Companies and their principals questioned the Commission's jurisdiction over them. *See* Pet., at 4-5. We used the term "jurisdiction" to refer to the Commission's "authority over" the telemarketing practices of common carriers, which involves a determination of the substantive reach of § 201(b) of

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[9/] Except for substituting "chapter" for "Act," the language of § 4(i) has remained the same since 1934. *See* Paglin, *supra* note 6, at 925. The Commission first construed that language to authorize the revocation of § 214 authorizations in 1998. *See CCN, Inc.*, 13 FCC Rcd 13599, 13607 (1998).

the Act. *See United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir. 2002).[10/]

The Commission once saw that § 201(b) did not reach the advertising practices of common carriers, but would fall under its "ancillary jurisdiction" under Title I of the Act. *See Validity of Con. Statute and Decisions of the Con. Depart. of Public Utility Control Relating to Unauthorized Intrastate Traffic*, 1 FCC Rcd 270, 285 n.95 (1986). It also realized that its jurisdiction over the advertising practices of carriers would be limited by the First Amendment. *See id.* So too would be its jurisdiction over telemarketing, which is also commercial speech protected by the First Amendment. *See Missouri v. American Blast Fax, Inc.*, 323 F.3d 649, 653 (8th Cir. 2003); *Rules and Regulations Implementing the Telephone Consumer protection Act of 1991*, 17 FCC Rcd 17459, 17468 (2002).

The enforcement of the "unjust and unreasonable" standard of § 201(b) to sanction commercial speech raises serious constitutional questions, not the least of which would be on the issue of vagueness under the First and Fifth Amendments.[11/] Consequently, the Commission's interpretation of § 201(b) as reaching commercial speech will fall subject to the rule of constitutional

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[10/] The Bureau draws a distinction between the Commission's "jurisdiction" and its "authority." *See* M&O, at 5 n.15. Of course, "[j]urisdiction is a word of many, too many, meanings." *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996). However, "[i]n very general terms, 'jurisdiction' means something akin to 'authority over.'" *Gonzalez*, 311 F.3d at 443. APA § 558(b) requires that a sanction be both within an agency's "jurisdiction" and "authorized" by law. 5 U.S.C. § 558(b). For revocation to be imposed here, § 201(b) first must give the Commission "authority over" the Companies' telemarketing practices, or conversely their telemarketing practices must be within the "substantive reach" of § 201(b). *See Gonzalez*, 311 F.3d at 443. If so, then the Commission must be expressly "authorized" by Congress to revoke § 214 certification as a sanction for engaging in a telemarketing practice that violates § 201(b).

[11/] The revocation of the Companies' operating authority triggers due process protection. *See Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

doubt. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999). Under that rule, courts will not "infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries" or "presume from ambiguous language that Congress intended to authorize an agency to do so." *Id.* (quoting *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997)). Because it touches so close to First and Fifth Amendment rights, the power to sanction commercial speech cannot be read into § 201(b). *See Standard v. Olsen*, 74 S. Ct. 768, 771 (Douglas, Circuit Justice, 1954).

III. Issue (c) Must Be Amended

The Bureau somehow reads issue (c) to contemplate an order that the Companies and/or their principals "cease and desist *violating the law*." M&O, at 7 (emphasis in original). That is simply not how the Commission crafted the issue. As written, issue (c) calls upon Administrative Law Judge ("ALJ") Steinberg to determine whether the Companies "and/or their principals should be ordered to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission." *Order*, at 14 (¶ 27(c)). The provision of such service without prior Commission consent is lawful. *See* Pet., at 8. *Westel* settled the issue of whether § 312(b) authorizes the Commission to order a person to cease and desist lawful conduct.

In *Westel,* the Commission agreed that it lacked jurisdiction under § 312(b), because the issue it designated for hearing did not contemplate ordering the individual "to cease and desist specific misconduct, but rather contemplates barring him from holding Commission authorizations or participating in Commission auctions." 13 FCC Rcd at 6344 n.3. Consequently, the Commission amended both the jurisdictional statement in the *Westel* designation order and the issue designated for the show cause hearing. *See id.* at 6348. It should do the same here.

At a minimum, the Commission must amend the jurisdictional statement in paragraph 26 of

the *Order* to specify the statutory authority under which it can order the principals to cease and desist from the provision of any interstate common carrier service. *See Westel*, 13 FCC Rcd at 6348. We have no idea what that authority may be, but *Westel* eliminated § 312(b) of the Act as a candidate.

The Bureau claims that the ordering clauses require the ALJ to decide "whether the Companies' principals violated the Act or the rules." MO&O, at 7. That is not so. Issue (a) requires the ALJ "to determine whether [the Companies] engaged in a misleading and continuous telemarketing campaign in apparent willful and repeated violation of section 201(b) of the Act's prohibition against unjust and unreasonable practices." *Order*, at 14 (¶ 27(a)).[12/]

The Bureau next claims that the ALJ must consider whether to order the principals to "cease and desist from providing common carrier service *without prior Commission consent*" (i.e., to cease and desist from violating the law) "only if" he finds that the principals engaged in illegal conduct. M&O, at 7 (emphasis in original). As we have pointed out, the *Order* does not direct the ALJ to find whether the principals violated § 201(b). Absent a finding that the principals were violating the law, the ALJ will be without grounds to order them to cease and desist anything.

Following *Westel*, the Commission should overhaul issue (c) completely. It has to delete the reference to the principals and rewrite the issue to mirror issue (a). If he finds against the Companies under issue (a), the ALJ should be directed to determine under issue (c) whether the Companies should be ordered to cease and desist violating § 201(b) by engaging in a "misleading and continuous

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[12/] We note that no sanction should be imposed for an "apparent" willful and repeated violation of the Act.

telemarketing campaign." *Order*, at 14 (¶ 27(a)). That may be redundant considering issue (b).[13/]

IV. The Companies Cannot Be Enjoined Under § 312(b) Of The Act

The Commission claimed § 312(b) of the Act as its sole authority to order the Companies and/or their principals to cease and desist. *See id.* at13-14 (¶¶ 26, 27(c)). The Bureau now maintains that the Commission's authority derives from § 312(c), which it contends "plainly contemplates a hearing proceeding against a 'person' before the issuance of a cease and desist order." Opp. at 7.[14/] Nothing in the legislative history of § 312, nor in its explicit language, suggests that a Title II carrier holding no Title III license can be the subject of a § 312(b) cease and desist order.

As the Supreme Court noted in 1950, the Commission was not authorized to issue cease and desist orders:

> The Commission itself has indicated to Congress that it was embarrassed by its inability to issue cease and desist orders, that it has at its disposal only the cumbersome weapons of criminal penalties and license refusal and revocation. But, so far as we are aware, the Commission request did not go beyond asking for power to issue a cease and desist order against a licensee. No power was sought against a third party.[15/]

Congress first gave the Commission the power to issue cease and desist orders in 1952, when it enacted § 312(b). The legislative history of the 1952 amendments makes it clear that Congress

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[13/] If the ALJ finds against the Companies under issue (a), and revokes their operating authority under issue (b), the Companies necessarily will have to cease and desist providing interstate common carrier services and from violating § 201(b).

[14/] The use of the term "person"in § 312 is not enlightening insofar as the term is defined under the Act to include "an individual, partnership, association, joint-stock company, trust, or corporation." 47 U.S.C. § 153(32).

[15/] *Regents of the University System of Ga. v. Carroll*, 383 U.S. 586, 601-02 (1950) (footnotes omitted).

"person" in §§ 312(b) and 312(c) means "an individual, partnership, association, joint-stock company, trust, or corporation" that holds a radio station license (or a construction permit).

A cease and desist order is also considered an "administrative sanction" under the APA. *See* 5 U.S.C. § 551(10)(G). For that reason, a cease and desist order can only be issued as expressly "authorized by law." *Id.* § 558(b). Therefore, such an order can be directed at the Companies as authorized by § 205(a), not § 312(b).

V. The Principals Cannot Be Enjoined Under § 312(b) Of The Act

By its plain language, § 1.701 of the Rules provides for show cause proceedings only against common carriers. *See supra* p. 2. Not surprisingly, the rule has never been invoked by the Commission against a principal of a common carrier.[18/] Nor was § 312(b) of the Act invoked as the jurisdictional basis for a show cause proceeding initiated under § 1.701 of the Rules.

We have examined the 93 cases in which the Commission initiated a proceeding to issue a cease and desist order under § 312(b) of the Act. The Commission never ordered a principal of a

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[18/] *See Bellsouth Tel. Operating Companies*, 10 FCC Rcd 5637, 5640 (1995); *Ameritech Tel. Operating Companies*, 10 FCC Rcd 5606, 5609 (1995); *US West Communications, Inc.*, 10 FCC Rcd 5523, 5526 (1995); *Pacific Bell*, 10 FCC Rcd 5503, 5506 (1995); *NYNEX Tel. Operating Companies*, 10 FCC Rcd 5492, 5495 (1995); *Southwestern Bell Tel. Co.*,10 FCC Rcd 5306, 5313-14 (1995); *Bell Atlantic Tel. Operating Companies*, 10 FCC Rcd 5099, 5102-03 (1995); *Southwestern Bell Tel. Co.*, 10 FCC Rcd 4407, 4412 (1995); *New York Tel. Co.*, 5 FCC Rcd 7173, 7174 (1990); *Southwestern Bell Tel. Co.*, 5 FCC Rcd 7179, 7181 (1990); *Pacific Bell*, 5 FCC Rcd 7176, 7178 (1990); *New England Tel. & Tel. Co.*, 5 FCC Rcd 7170, 7171 (1990); *New York Tel. Co.*, 5 FCC Rcd 867, 871 (1990); *Unauthorized Intrastate Traffic*, 1 FCC Rcd at 279; *LECs' Rates, Terms and Conditions for Expanded Interconnection for Special Access*, 9 FCC Rcd 2742, 2745 (CCB 1994); *Southwestern Bell Tel. Co.*, 9 FCC Rcd 6488, 6491 (CCB 1994); *Nevada Bell*, 6 FCC Rcd 48, 49 (CCB 1990); *Communications Satellite Corp.*, 5 FCC Rcd 1819, 1819 (CCB 1990); *LEC Access Tariff Rate and Earnings Levels*, 5 FCC Rcd 482, 483 (CCB 1990); *Access Billing Requirements for Joint Service Provision*, 4 FCC Rcd 2163,2165 (CCB 1989); *LEC Access Tariff Rate Levels*, 4 FCC Rcd 762, 763 (CCB 1988); *Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69*, 3 FCC Rcd 3947, 3947 (CCB 1988).

facilities-based IXC or LEC to show cause. Only the principals of "switchless resellers" of IXC services, such as the Companies, have been subjected to orders to show cause issued under § 312(b). *See Order*, at 13-14 (¶ 26); *Business Options, Inc.*, FCC 03-68, 2003 WL 1792186, at *12 (Apr. 7, 2003); *CCN, Inc.*, 12 FCC Rcd at 8560. *See also Publix Network Corp.*, 17 FCC Rcd 11487, 11507 (2002). Even if § 312(b) can be employed against the principals of common carriers, §§ 312(e) and APA § 558(c) combine to preclude the issuance of a show cause to the principals in this case.

APA § 558(c) embodies the "second chance" doctrine, *Pillsbury Co. v. United States*, 18 F. Supp. 2d 1034, 1038 (Ct. Int'l Trade 1998), under which a proceeding cannot be instituted until the licensee had been given "(1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c). Thus, if the principals can be treated as "licensees" under APA § 558(c), which is a stretch, they were entitled to notice and the opportunity to show that they had "put [their] house in order" before the Commission issued them a show cause order. *Atlantic Richfield Co.* v. *United States*, 774 F.2d 1193, 1200-1 (D.C. Cir. 1985) (quoting *Blackwell College of Business* v. *Attorney General*, 454 F.2d 928, 933-34 (D.C. Cir. 1972)).

It is now clear that the Commission could identify directors, officers, managers, supervisors and employees of the Companies prior to the issuance of the *Order*.[19/] Yet, the *Order* only named one person, Marsh Gibbs, who may have consciously and deliberately taken actions allegedly in apparent violation of § 201(b). *See Order*, at 4-10 & nn.15-18, 20, 22-33. The Commission accuses

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[19/] The Bureau served the respondents with an 88-page request for 645 admissions. *See* Enforcement Bureau's Request for Admission of Facts and Genuineness of Documents (May 27, 2003). The respondents were requested to admit that named individuals were among the Companies' management and employees. *See id.* at 4-5, 11, 32, 33, 44, 46.

no other person of willfully violating § 201(b). Therefore, a principal of the Companies was entitled to written notice of the conduct which may subject him or her to an order to cease and desist, and the opportunity to "correct" his or her "transgressions," before the Commission instituted its show cause proceeding. *Anchustegui v. Dep't of Agriculture*, 257 F.3d 1124, 1129 (9th Cir. 2001) (quoting *Air North America v. Dep't of Transportation*, 937 F.2d 1427, 1438 (9th Cir. 1991). No principal received any notice or opportunity to achieve compliance with § 201(b) prior to the release of the *Order*. For that reason, no cease and desist order issued against a principal in this case would be valid under §§ 312(e) of the Act and 558(c) of the APA. *See id.*

VI. A Forfeiture Cannot Be Imposed In This Case

The Bureau argues that a forfeiture can be imposed, because conduct in violation § 201(b) of the Act is not listed in § 1.80(a) of the Rules as statutorily exempt from forfeiture under § 503(b)(1) of the Act. *See* M&O, at 8. However, the imposition of a forfeiture is obviously a sanction. *See* 5 U.S.C. § 551(10)(c). A rule reflecting the Commission's interpretation of the § 503(b)(1) exemption is not a substitute for the express statutory authorization necessary to impose a forfeiture for a § 201(b) violation. *See id.* § 558(b).

The Commission has not seen fit to promulgate rules governing the telemarketing practices of Title II carriers. Because of that, a carrier can be sanctioned for engaging in telemarketing practices in violation of § 201(b) only if it fails to obey a Commission order prescribing just and reasonable telemarketing practices that was issued in accordance with § 205(a) of the Act. *See* Pet., at 8-10. The imposition of a forfeiture is expressly authorized by § 205(b) if a carrier engages in telemarketing practices in violation of a prescription order. *See* 47 U.S.C. § 2059a). The Commission cannot circumvent the process authorized by § 205 by imposing a forfeiture under § 503.

See 47 U.S.C. § 503(b)(1); 5 U.S.C. § 558(b).

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May 30, 2003

CERTIFICATE OF SERVICE

I, Jennifer C. Colman, do hereby certify that on this 30th day of May, 2003, a copy of the foregoing "Opposition to Motion to Strike and Reply to Opposition to Petition for Reconsideration" was hand-delivered to the parties listed below:

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